

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for)	WC Docket No. 07-135
Local Exchange Carriers)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Inter-carrier)	CC Docket No. 01-92
Compensation Regime)	

**COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

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August 24, 2011

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SUMMARY

The extensive new details involved in the ABC Plan of the large LECs are consistent with the thrust of the Commission's earlier NPRM: to eliminate virtually all of the interstate and intrastate access and federal Universal Service Support revenues now received by rural CLECs. The inevitable result will be that the superior customer service and widely deployed broadband these CLECs offer on a competitive basis in rural areas will no longer be an embarrassment to the large LECs. Instead, they will remain free to continue the historical concentration of their investment in urban areas.

RICA and its member rural CLECs have for many years urged the Commission to end the identical support rule and calculate support for rural CETCs on the basis of their individual costs in the same manner as determined by rural ILECs. The Commission's failure to eliminate identical support inevitably led to excessive support for many and insufficient support for others. The ABC plan is consistent with the illogical focus of the NPRM, and the National Broadband Plan before it, that the solution to the disparity in broadband availability between large and small carriers is to reduce drastically the revenues available to small carriers and parcel it out in grants to the large carriers. RICA's responses to some of the specific questions asked by the Bureau are summarized in the order presented in the Further Inquiry.

Separate fixed and mobile support systems should be established, and the mobile system should give first priority to the availability of voice service where none exists, then turn to upgrading mobile service to broadband. A small total amount of one time "grants" will not be effective or sufficient to achieve either ubiquitous mobile voice or expanded mobile broadband. Operating expenses in low density areas also require support and one-time grants do not provide the continuous capital needed in such an enterprise.

The Commission should retain appropriate rural and urban distinctions in its access and universal service rules because the differences between large and small carriers not only remain valid, but are increasing as the large Carriers continue their consolidation in both wireline and wireless markets. Management of the large, publicly traded companies is focused on actions that benefit their stock price and management compensation. Small company managers actually live among the rural customers they serve and, as demonstrated by their superior service, are focused on providing the maximum possible service consistent with financial feasibility.

The fundamental fallacy in the approach of the ABC Plan and the NPRM before it involves the complementary but incorrect assumptions that (1) more USF support will incent large carriers to expand broadband to the high cost/low margin areas they have long ignored; and (2) that the rural carriers, ILECs and CLECs, that have deployed broadband will be able to absorb substantial reductions in revenues but somehow continue their high level of service indefinitely.

The ABC Plan proposes Commission adoption of a proprietary model to determine support in areas served by price cap carriers. RICA has consistently pointed out that the use of models in rural areas may be acceptable, so long as adequate provisions are made to permit determination of support based on actual costs in areas that those inevitable areas where the model does not accurately predict cost. Any model adopted by the Commission must be entirely transparent and public and must be validated by comparison of its predictions with a valid sample of actual forward looking cost studies.

The ABC Plan perpetuates the unlawful proposal to provide ILECs a Right of First Refusal of Universal Service support, but does so in the context of the Plan's further proposal to relieve those ILECs of all the COLR obligations that provided at least the original colorable, if

inadequate, justification for the preference. In any event it would be plain error to include in rules intended to expand broadband deployment in rural areas a discrimination in favor of the very carriers that have failed to serve those areas.

The ABC Plan proposal for a five year build out window and 10 year termination will set the stage for a play in which the support grantee will create a lot of hoopla on award, then do little until just before the five year mark when it will file for a hardship extension based on unforeseen circumstances. All the while support payments will be flowing to its bottom line.

RICA agrees that a properly constructed and implemented “procurement model” can be an effective method of choosing support recipients, but the required “supported services” must be the same for all carriers and all locations.

The Act makes clear state authority to make ETC designation determinations, and, as the State Members point out, such authority cannot be eliminated by an FCC forbearance order. Nor can newly built locations be exempted from the obligations of an ETC. State authority to administer other aspects of the CAF may be limited with respect to CLECs and other carriers not subject to their jurisdiction by state law.

The Joint Letter’s proposal for a 10% rate of return and the State Members’ 8.5% proposal both suffer from a fatal lack of evidentiary support. No evidence is provided regarding the embedded cost of debt, the debt/equity ratios, or the cost of equity of the carriers to which they would be applied. To change the existing prescription the commission is obligated to examine these factors, with careful attention to the increased risk to which carriers are now exposed.

The ABC Plan also continues the *sub silent* adoption of portions of the NCTA plan to protect its members from competition by claiming to reduce unnecessary support in areas where

“unsupported” competition exists. That proposed was based on an invalid assumption of similar costs in rural municipalities and rural areas outside the municipalities, and the invalid assertion that cable voice is “unsupported” in those municipalities when it rides on facilities whose major costs are recovered through revenues from video services. LECs, including rural CLECs if they are permitted to submitted cost studies, must segregate regulated and unregulated investment, expenses and revenue and are prohibited from cross-subsiding between them.

Adoption of the ABC Plan’s proposal to exclude support for highest cost customers and relegate them to satellite service is not consistent the Act’s provisions requiring ETCs to offer supported services “throughout” their service area or with the principle that consumers in rural areas should have access to services that are reasonably comparable to urban areas.

The Joint Letter and the ABC Plan make much about dividing up a “budget” of universal service support. This approach continues the fundamental flaw of the NPRM that assumes the amount of broadband support available should be defined by the amount of revenue that can be raised from the declining lines and minutes of use of the “legacy” voice system. The only rational approach to determining how much support is available for broadband is to develop a plan to obtain contributions from providers of broadband services (and ultimately their customers).

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**COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

The Rural Independent Competitive Alliance (“RICA”) files its comments with respect to the Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceedings, DA 11-1348, released by the Wireline Competition Bureau on August 3, 2011.¹ (“Further Inquiry”). The Further Inquiry requests response to sixteen pages of

¹ The Further Inquiry was not published in the Federal Register until August 10, 2011 (76 Fed. Reg. 49401) or 14 days before the comment date. On August 9, 2010 the Administrative Conference of the United States published its Recommendation 2011-2 to the effect that comment period for “significant regulatory actions” should be 60 days and for all others 30 days, and that when shorter periods are set agencies should provide an appropriate explanation for doing so. 76 Fed. Reg. 48791 No explanation for the short period was given. However, on August 5, 2011 the Wireline Competition Bureau and Wireless Telecommunications Bureau denied requests from state regulators and consumer advocates for an extension of time with the explanation the “circumstances presented here [do not] warrant granting an extension.” Order, DA 11-1374, August 8, 2011. Given the detailed, specific description of the complex new factual and legal issues presented in the requests for extension of time, the denial by the Bureaus was arbitrary and capricious in

questions generally related to the “ABC Plan” filed by the Bell Companies and some mid-sized carriers on July 29, 2011, the “Joint Letter” filed by the ILEC associations on the same date, the “RLEC Plan” submitted by the rural LEC Associations as their initial comment, and the May 2, 2011 proposal of the State Members of the Universal Service Joint Board (“State Members”).²

RICA is a national association of rural competitive local exchange carriers (“CLECs”) that are affiliated with incumbent rural telephone companies (“ILECs”). RICA has participated extensively in these proceedings during the more than ten years these questions have been docketed.

The ABC Plan and the “Joint Letter,” which form a substantial part of the basis for the Further Inquiry, were apparently the result of industry negotiated agreements. RICA was not invited and did not participate in those discussions. Several aspects of those proposals however have potentially severe adverse effects on RICA member rural CLECs. Essentially the plans propose or endorse the prior FCC proposals to eliminate virtually all of RICA members’ interstate and intrastate access and universal service support revenues. The result will be the elimination of competition for landline and mobile services in a significant portion of rural America.

that the requests were substantively valid and entitled, at a minimum, to an explanation far beyond “not warranted.” This cursory dismissal also ignores the troubling point made in the NARUC August 5, 2011 Motion for Extension of Time that “...apparently, quite a bit of detail of the proposals was relayed to FCC representatives, absolutely no detail was included in any of the *ex parte* notices.” The sixteen substantive pages of the Further Inquiry were released on the third working day after the voluminous ABC plan was filed.

² Although the Further Inquiry does not purport to be a Notice of Inquiry or (Further) Notice of Proposed Rulemaking, its scope and significance are such that it is the functional equivalent. As the Consumer Advocates’ Motion for Extension of Time asserted correctly, “The scope of the requested comments raise the Notice of Proposed Rulemaking (NPRM) to the level of a major NPRM...” Given that the Bureau does not have delegated authority to issue NPRMs or NOIs, (47 C.F.R. 0.291(e)) it must follow that its lack of authority cannot be cured by change the title of a document that is the functional equivalent of an NPRM or NOI.

RICA's April 2011 comments, and many previous comments, have described the benefits to consumers in rural America that have been realized as a result of the expansion of rural CLECs into the areas long neglected by the large ILECs.³ RICA members have brought competition and broadband services into areas that would otherwise still be without those services. Yet both the Commission's proposals set forth in the NPRM and the ABC plan seek to eliminate the already insufficient level of USF and access levels that RICA members have relied on in making network investments to expand services in rural America.

RICA members have demonstrated how universal service can be expanded to unserved and underserved rural areas by leveraging the utilization of rural rate-of-return carrier networks and providing the necessary cost recovery framework to encourage rural carriers to edge out from their incumbent service areas into nearby communities. RICA has respectfully urged the Commission for many years in this proceeding and other proceedings to end the USF "identical support" rule and fulfill its responsibilities as the ultimate steward of the USF by ensuring: 1) that USF is directed where it is needed and 2) that the distribution of USF is based on the actual costs required to provide universal service.⁴

The Commission's failure to act on these recommendations has resulted in the perpetuation of the discredited "identical support rule" which, in turn, has led to the distribution of scarce USF dollars to multiple wireless carriers serving the same location. While the Commission has expressed continued concern over potential "waste, fraud and abuse" in the USF, the millions of dollars of "waste" resulting from supporting multiple wireless carriers, with multiple handsets per family on the basis of the ILEC's very different cost structure has

³ RICA Comments, WC Doc. 10-90, Apr. 18, 2011, pp. 4-7.

⁴ See, e.g., RICA Reply Comments, High Cost and Universal Service support, WC Doc. No. 05-337, Jun 2, 2008, pp. 5-6.

been a matter of public knowledge for many years. The new found urgency to eliminate support rather than rationally support CETCs on the basis of their own cost is a crises created by the Commission's failure to act with reasonable dispatch.⁵

Nor has the Commission focused on identifying and quantifying how the experience of RICA members in expanding the provision of universal service can be utilized to establish a sufficient and predictable mechanism to expand the provision of broadband service throughout rural unserved and underserved areas of the nation. In fact, as reflected by both the NPRM and the *Further Inquiry*, the Commission has disregarded the existing efforts of rural CLECs and wireless providers affiliated with incumbent rate-of-return carriers, and ignored the specific proposals they have offered over years of deliberations.

There is no doubt that action to ensure that the USF and intercarrier compensation frameworks are reformed is long overdue. By issuing the *Further Inquiry* within three days of the filing of the ABC Plan, the Commission has demonstrated its ability to act quickly. RICA respectfully urges the Commission, however, to act thoughtfully as well as quickly in order to ensure that it addresses and adopts proposals that are consistent with statutory requirements and

⁵ See, 5 U.S.C. 555(b). Three and a half years ago, citing the urgent need for action, the Commission adopted an "interim" freeze of CETC support. *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008) ("Interim Cap Order") RICA supported this action with the caveat that rural CLECs should be able to obtain cost based support, and was heartened when the Interim Cap Order did, contain an exception for the submission of cost studies. Because of the exception, RICA did not appeal the order. The Court of Appeals upheld the Interim Freeze, specifically relying on the exception as a reason why no party would be harmed. *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1101, 1104, 1105 (D.C. Cir., 2009) It subsequently developed however that the Commission had no intent to allow CETCs to receive cost-based support, but only purported to allow carriers that demonstrated that their costs equaled or exceeded the ILECs to continue to receive "identical support." *Worldcall Interconnect, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the State of New York*, Order, 26 FCC Rcd 6212 (WCB 2011) Even this limited relief has been denied to those carriers that have filed their costs, because USAC will not accept the showings without approval of the Commission and the Wireline Competition Bureau has failed to approve or disapprove the cost studies..

the public interest. It is in this context that RICA offers the following observations and concerns with respect to the ABC Plan and the questions set forth in the *Further Inquiry*.

RESPONSE TO SELECTED QUESTIONS IN FURTHER INQUIRY

I Universal Service

A. Separate Support

RICA agrees that separate fixed and mobile support mechanisms should be established. In prior comments, RICA pointed out that many rural areas lack even voice grade mobile service and that the absence of such service in isolated areas creates unacceptable risks to public safety.⁶ It may be that the economics of some areas are such that establishing (and operating) initial mobile service would have essentially the same costs with or without broadband capability. To the extent, however, there is a trade-off between maximizing the availability of voice grade mobile service and upgrading existing service, priority in support funding should go first to ensuring the deployment of voice grade service in unserved rural areas.

The ABC Plan suffers from the same infirmities as the Commission's prior proposals for a mobility fund in that (a) the total amount appears grossly inadequate⁷ and (b) it persists in the myth that establishing USF "grants" to cover the initial capital costs high in cost rural service will be "sufficient" to allow both initiation of service and continued operation for the indefinite future.⁸ This approach is, at best, of limited validity only in the areas most closely resembling

⁶ RICA Comments, WC Doc. 10-90, Apr. 18, 2011, p. 17; Universal Service Reform, Mobility Fund, RICA Reply Comments, Jan. 18, 2011. The State Members agree that mobile service should be a supported service. pp. 26-27.

⁷ The State Members propose \$500 million in grants, p.68.

⁸ Although two courts of appeal have ruled to the contrary, AT&T continues at the Supreme Court to challenge the IRS's rejection of its claim that the current USF payments are non-taxable capital contributions. *AT&T v. United States*, Petition for a Writ of Certiorari, filed Apr. 4, 2011, No. 10-1204.

areas that are feasible without support, and therefore most likely to be eventually served anyway. Where support is most needed are those areas where the operating costs are very much higher because of the low population density, large distances for backhaul, installation and repair service, and harsh environmental conditions. Accordingly, in order to establish specific and predictable support mechanisms, the Commission must address not only “one-time” capital needs but also the ongoing costs of maintaining universal service in the nation’s high-cost-to-serve rural areas.⁹

As with all USF support, of course, funding availability is not unlimited, even under a rational contribution plan that obtains funds to support universal broadband from providers of broadband, and ultimately, their customers. However, it is irrational to set a budget for the USF or any element of it based on an ad hoc decision that a certain amount of funds are no longer needed for some other purpose without conducting an evaluation of the total amount of funds that would be required to meet the Congressional objective of “reasonable” comparability of rates and service between urban and rural areas. The National Broadband Plan at least made an effort to examine this question, although its answers were not necessarily valid.¹⁰ The ABC Plan’s top down proposal to use projected savings associated with intercarrier compensation reform for wireless carriers to offset reductions in high-cost support for CETCs involves no logical connection between the budgeted amount and the support needed.

B. Elimination of Rural and Non-Rural Carrier Distinctions

⁹ For capital intensive utility businesses, such as wireline or wireless mobile service, that are intended to continue providing service for the indefinite future, the investment of capital is a continuous, not a “one time” event. Thus calculations of the feasibility of recipients of “one time” awards must include an expectation that the enterprise will have sufficient earnings to attract additional capital in the future.

¹⁰ See, RICA Comments, A National Broadband Plan For Our Future, GN Doc. 09-51, Dec. 7, 2009, pp. 5-7.

RICA opposes elimination of the rural/non-rural distinctions in the USF and access charge rules. The primary reason for this opposition is that elimination would encourage expansion of “one size fits all” rules to carriers with vastly different situations. It is true that the rural/non-rural carrier distinctions in the Act are related primarily to size distinctions and that the study areas of many non-rural carriers include a substantial amount of rural area.¹¹ The large companies are large because in the late 19th and early 20th Centuries the Bell System companies monopolized service in the large cities by various means including refusal to interconnect with independents and refusal to allow independents to purchase Western Electric equipment.¹² The rural carriers mainly survived in small towns and rural areas and do not have a substantial urban presence.¹³

Despite the 1980s “Divestiture” of the Bell System, the distinction remains valid today because (1) the Commission has allowed Humpty-Dumpty to essentially be put back together, albeit in three pieces; and (2) two of those pieces constitute a virtual duopoly controlling the mobile wireless industry which is rapidly supplanting the wireline voice industry.

It is also true that the rural/non-rural distinction added to the Act in 1996 does not compel the Commission to establish separate USF and Intercarrier compensation rules for these classes of carriers. However, the USF and access charges distinctions between rural and non-rural

¹¹ 47 U.S.C. 153(37) The large/small distinction originated in the 1934 Act with Section 2(b)(2) which focused on the fact that interstate toll lines were then primarily under the control of AT&T and its Bell System affiliates.

¹² To the extent these practices persisted into the 1930s and beyond, the Commission provided no assistance to independents. *Oklahoma-Arkansas Telephone Co. v. Southwestern Bell Telephone Co.*, 6 F.C.C. 809 (1939).

¹³ The only major U.S. cities without a Bell Operating Company ILEC are Anchorage, Fairbanks, Honolulu and San Juan. (Honolulu was briefly a BOC city until Verizon managed to “flip” it.)

carriers (i.e. large and small) predate the 1996 Act and were developed in the early 1980s with the active participation and concurrence of the large carriers.

The comparative lack of broadband deployment in the ILEC areas of the large (non-rural) carriers is undoubtedly a combination of multiple factors including price cap regulation that provides strong incentives to focus investment in high density areas to maximize return on investment; the study area average cost calculation in the USF formulas; and the focus of competitors in the urban areas where enterprise customers tend to be located and where cable companies compete for telecommunications and internet service provision to residential customers. As publicly traded companies, management of the large carriers has strong financial incentive to make investment decisions that will benefit most the stock prices and management compensation. Rural carriers, by contrast, tend to be locally owned and controlled, and base investment decisions on real-life service needs and whether the projected revenues from the provision of service to meet rural consumer needs will recover the costs of providing the service.¹⁴

The rural/urban digital divide in large company areas is also a result of the misguided policies of the Commission with respect to rural CLECs and ILECs that have severely limited their ability to expand their demonstrated commitment to serving rural areas. For rural CLECs the combination of the identical support rule with the study area average rule has meant that USF support is generally unavailable to CLECs in the high cost areas of the large companies even though there remains substantial consumer demand for their service. Similarly, the study area

¹⁴ The State Members point out that: “Knowing that an area is currently ‘unserved’ doesn’t necessarily prove that it is also ‘uneconomic’ to serve in the future. Depending on the incumbent provider and its historical investment patterns, perhaps as much as 40% of its ‘unserved’ service area may not be ‘uneconomic’.” p.83.

average rule combined with the “parent trap rule” has made it difficult for small rural ILECs to “edge out” by acquiring exchanges from the large companies.¹⁵

The factors summarized above, and more, illustrate a fundamental fallacy in the approach adopted in the USF/ICC NPRM and the ABC Plan: the complementary assumptions that (1) the provision of more USF support will incent the large companies to expand broadband to high cost/low margin areas they have long ignored and (2) that the rural carriers can absorb substantial reductions in interstate revenues but somehow continue to provide their historically high quality, advanced services. A corollary to the first assumption apparently is that the large companies’ broadband deployment will include those areas currently served by rural CLECs, since under the NPRM or the ABC Plan, rural CLECs will be quickly stripped of the little federal USF they now receive and will lose essentially all of their interstate and intrastate access revenue.¹⁶

From the beginning of access charges in the 1980s, the Commission has understood that rural carriers generally have higher costs than non-rural carriers. In the *CLEC Access Charge Order*, the Commission explicitly recognized that rural CLECs’ costs are higher than urban CLECs and allowed them to mirror the NECA access rates.¹⁷ The ABC Plan would move all access to the \$0.0007 rate without regard to carrier size, costs or market. Under the ABC Plan, the lost access revenue of rural ILECs might be compensated to some extent with a new USF

¹⁵ In addition the long delays, expense and uncertainty involved in obtaining waivers of the frozen study area rule and, in some cases, ETC designation have added to the rural/urban divide.

¹⁶ RICA maintains, as stated in prior filings, that the Act does not permit the consolidation of all terminating access under the reciprocal compensation rules.

¹⁷ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order, 16 FCC Rcd 9923, paras. 65-66 (2001) (“*CLEC Access Charge Order*”). Of course shortly thereafter in the *MAG* order the Commission reduced the NECA rate substantially, but shifted the difference to the USF for rural ILECs only, thereby reducing the revenues it had just recognized were based on higher costs. *Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Order, 16 FCC Rcd 19613 (2001)

mechanism, but rural CLECs are apparently intended to just shrivel up and die. There is no consideration for the necessary recovery of expenses rural CLECs have incurred to provide service in reliance on the Commission's explicit policy with respect to rural CLEC access charges.

C. CAF Support for Price Cap Areas

1. Use of Model

The ABC Plan proposes to use a proprietary model to determine the cost of providing broadband and the necessary support levels in any given census block. The essential problem with this proposal, as RICA commented many times in the past regarding similar proposals, is that it fails to make any reasonable accommodation for the fact that in any particular area where a small entity might seek support, the model may be substantially in error. Just as the Rural Task Force Report demonstrated the wide range of erroneous results produced by the Commission's original model,¹⁸ the CQBAT model can be expected to have similar errors due to the inherent wide range of situations in rural areas. For large companies, such errors may balance out; for small companies, they can be disastrous. Any rules adopting a model must therefore also have a straightforward process by which a carrier can demonstrate that an area is, in fact, a high cost to serve area deserving of support in excess of the amount predicted by a model.¹⁹ This would not be a waiver process and would include a specific, short, time certain after which such showings would be deemed accepted.

¹⁸ See, *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Doc. Nos. 96-45, 00-256, Fourteenth Report and Order and 22d Order on Reconsideration in CC Doc. No. 96-45 and Report and Order in CC Doc. No. 00-256, 16 FCC Rcd 11244 (2001) para. 25.

¹⁹ The current average schedule system has an efficient process that operates in very similar circumstances. The State Member's proposal contains a similar mechanism. P. 36

The Commission should not, in any event, adopt a model that is not entirely transparent and fully available to public inspection. Any model must also be regularly updated to reflect changes in economics and technology, and such revision process must also be entirely public and transparent. As RICA pointed out with respect to the discussion of models in the National Broadband Plan:

In addition, costs are in more or less constant flux and technology changes rapidly so that any conclusions regarding comparative costs must be continually reevaluated. Besides the constant changes which quickly render any model inputs obsolete, no model can be relied on if its outputs are not verified. Verification, in the case of a cost model means that actual cost studies are performed on representative sample of areas and compared with the results predicted by the model.²⁰

A valid, public transparent verification of the CQBAT model is necessary before it can be adopted to determine rights and responsibilities.

2. Right of First Refusal

The ABC Plan continues the plainly unlawful proposal to provide non-rural price-cap ILECs with a Right of First Refusal (“ROFR”) set forth previously in the *NPRM* and other prior proposals. RICA has explained at length why such a rule would be both unlawful and bad public policy.²¹ There is in the ABC Plan even less of a colorable argument for discrimination in favor of non-rural ILECs than in prior proposals. Those proposals at least claimed (incorrectly) that discrimination in support would be justified because ILECs state Carrier of Last Resort (“COLR”) obligations so far exceeded the Section 214(e) duty of offering the supported services throughout an ETC’s designated service area. The ABC Plan proponents cannot even make this claim because they also argue that the Commission should preempt and eliminate all state COLR

²⁰ RICA Comments, A National Broadband Plan for Our Future, GN. Doc. No. 09-51, Jun. 8, 2009, pp. 10-11.

²¹ RICA Comments, Connect America Fund, WC Doc. 10-90, Apr. 18, 2011, pp. 15-16.

obligations.²² Just as it is wrong to base CETC support on ILEC support, so it would be neither competitively neutral nor in the best interests of subscribers to tilt the scales in favor of the very price cap ILECs that the record shows have a historical lack of interest in bringing broadband to rural America.

Even the State Members that generally support anointing the ILECs as single recipients of support recognize that result may not be appropriate in all cases:

In a very few cases where a CETC has overbuilt ILECF [sic] facilities over a wide area, the State commission should, on petition, conduct a fact-specific proceeding to determine whether the ILEC or the CETC should be designated as the single supported carrier.²³

There are, however, at least two serious problems with this approach: (1) Even if the CLEC ultimately prevails, the area that has not yet been overbuilt will thus be protected from competition and the population deprived of improved service; (2) The large ILEC will be able and have every incentive to impose substantial expense and uncertainty on the CLEC during the state proceeding.

It is one thing to say that a carrier loses support as a result of change in the formula setting the level of cost above which support is available. It is quite another thing to say that a CETC becomes ineligible for support because it is not an ILEC, even where its costs exceed that for which an ILEC would receive support.

3. Public Interest Obligations

²² ABC Plan, Attach. 1, p. 13 (“If a state maintains obligations to serve, including carrier of last resort (COLR) obligations for price cap incumbent LECs, the Commission must preempt such obligations as inconsistent with federal broadband policy unless the state fully funds the obligations with explicit support and the ILEC agrees to accept the obligations in exchange for funding. Otherwise, COLR obligations are incompatible with the transition to broadband networks because in many cases they require incumbent LECs (and only incumbent LECs) to divert resources from the deployment of broadband networks.”)

²³ State Members p. 139.

The present system, for all its faults, provides support only to carriers, ILECs or CLECs and wireless CETCs, that have actually built facilities and are serving customers.²⁴ Although vague, the ABC Plan apparently contemplates that the carrier selected to receive CAF support will have five years to build out to the locations below the cost threshold, then receive support for an additional five years. After 10 years, support and obligations will both terminate. It doesn't take a crystal ball to foresee at least one likely scenario where the CAF recipient is a non-rural ILEC: There will be a lot of hoopla at the time support is awarded, followed by at least four years of inactivity and then the filing of a waiver petition claiming unforeseen hardships.²⁵ All the while the support payments will be flowing to the carrier's bottom line. At a minimum, support should follow demonstration that much shorter build-out milestones have been met.

4. ETC Requirements

RICA has previously supported a "procurement model" to the extent there are situations where the Act permits the Commission to choose only a single carrier for support. Such a model allows consideration of relevant, valid factors such as a carrier's demonstrated commitment to service in rural areas. Consideration of such factors however does not mean that carriers are free to negotiate whatever service obligations they can get away with. The Act constrains the Commission to disburse USF only for the provision of designated "supported services." The supported services must be the same for all carriers.

²⁴ The Commission's decisions in recent years to forebear from requiring some CETCs to be at least partially facilities based are unwise and will inevitably result in excess support, just as the Identical Support Rule did.

²⁵ During the expansion of the cable industry to the nation's cities, the cable operators repeatedly and successfully used this tactic to eliminate obligations acquired as a condition of being awarded the franchise.

The State Members correctly point out that the Act assigns ETC designation authority to state commissions (unless they do not have jurisdiction) and that authority is not one the Commission can rescind by forbearance.²⁶

5. State Role

While state input into the Commission's decision making process is generally desirable because it provides more detailed and specific experience than is generally available at the federal level, the authority of the states to make decisions regarding federal support is specifically delineated in the Act and is not subject to expansion or contraction by the Commission. The State Members point out:

The Act allows States to define individual service areas for ETCs as a part of ETC designation proceedings. States are best positioned to make sound decisions on these matters. They have the greatest local knowledge and expertise to understand what areas are unserved. States are also better positioned than the FCC to evaluate whether a proposed ETC is financially and technically qualified to serve as an ETC. As in the past, where the States are free to make a discretionary decision, advice from the FCC can be very useful and often will be followed.²⁷

State Commissions, in turn, have only the authority and *in personam* jurisdiction given to them by their respective legislatures. In many states, the state commission's authority to regulate CLECs is quite limited or non-existent.

With respect to the state role in ROFR determinations, RICA has explained above why a ROFR should not be adopted in any event. But even if such a requirement should survive judicial review, for states to expend the resources necessary to validate a carrier's claims appears to be the type of unfunded mandate that simply shifts federal regulatory costs to state tax payers.

²⁶ State Members, p. 87.

²⁷ State Members, p. 138.

The proposal to have states determine the validity of extension of service charges for newly built locations creates a jurisdictional issue if by some unlikely event a CLEC should actually become a CAF recipient under the ABC Plan. In any event, the ABC Plan proposal to exempt newly built locations from service obligations is contrary to the obligations of an ETC specified in Section 214(e)(5) and cannot be lawfully adopted.

D. Reforms for Rate of Return Carriers

RICA has a specific interest in the proposed changes for rate of return regulation as a result of its long term advocacy of the position that instead of the Identical Support rule, rural CLECs should determine their eligibility for USF support based on their actual cost. Actual cost would be determined in the same manner as it is for rural ILECs, whether entirely by cost studies or by a model with a cost study option as discussed above. The Joint Letter proposes that “The CAF calculation for areas served by rate-of-return companies would be made using an interstate rate-of-return of 10%.”²⁸ The Joint Letter provides no information as to the derivation of that number. The current 11.25% rate of return was prescribed by the Commission following an extensive investigation into the costs of debt and equity, and debt/equity ratios of telecommunications carriers.²⁹ The world has changed considerably of course in the 21 years since that prescription. The Commission certainly has the right, and perhaps the obligation, to revisit and revise that prescription from time to time. Any such re-prescription requires a sound factual record, but no such record has been developed in this proceeding.

The State Members propose an overall return of 8.5%. Starting with their unsupported belief that debt cost is around 5% and assuming a 50/50 debt/equity ratio for convenience, the

²⁸ Joint Letter p. 2.

²⁹ Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Order, CC Doc. No. 89-624, 5 FCC Rcd 7507, 7532 (1990) “...rate of return is intended to provide a carrier with the opportunity ‘to earn a return that is high enough to maintain the financial integrity of the company and to attract new capital to the business.’”

State Members conclude 12% is the proper return on equity. They acknowledge that risk for LECs has increased since 1990 but believe, again without specifying the evidence therefore, that increase in risk is offset by the nature of USF support.³⁰

A critical input to cost of equity determinations is the risk to the enterprises involved.³¹ For all LECs, including rural CLECs, risk has unquestionably increased substantially over the last 10 years. It is theoretically possible that changes in the cost of debt and debt/equity ratios may ameliorate the increased risk when a composite return is determined, but the Commission can only make that determination on the basis of a proper record.

With respect to areas with unsupported competition, RICA remains of the view expressed in its comments on the similar proposals set forth by the National Cable & Telecommunications Association (NCTA) proposal.³² There RICA pointed out that the proposal was fundamentally flawed because its factual premise that rural municipalities and surrounding rural areas have similar costs. NCTA was apparently unaware that American farmers live on their farms and not in European style villages.³³ The factual error was compounded by the false assertion that the existence of cable voice in a rural town proves that universal service support to LECs is not needed. The assertion is false because, among other reasons, it ignores the facts that cable voice

³⁰ State Members pp. 36-37.

³¹ *Duquesne Light Co. v. Barash*, 488 U.S. 299, 314 (1989) “Admittedly, the impact of certain rates can only be evaluated in the context of the system under which they are imposed. One of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise. *Id.*, at 603 (“[R]eturn to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks”); [*Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693 \(1923\)](#) (“A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.”)

³² RICA Comments, *Reducing Universal Service Support in Geographic Areas That Are Experiencing Unsupported Facilities-Based Competition*, RM-1154, Jan. 7, 2010.

³³ *Id.*, p. 2.

rides on facilities constructed and supported by video services that the vertically integrated cable industry provides itself with video content on much more favorable terms than it makes content available to LECs, if at all. RICA also pointed out that cable operators do not have ETC obligations to extend service to unprofitable areas.³⁴ Adoption of the NCTA proposal or variations on it would in many cases destroy the economic leverage that results when a service area includes both high and low density areas.

The RLEC plan proposed to address the unsupported service area with test based on the availability of service to 95% of households in a study area. Given the great disparities in densities in some areas, better test would be service to 95% of the area.

E. Ensuring Consumer Equity

* Rate Benchmark

Proposals to utilize benchmarks to limit support have been on the record for some time. The Further Inquiry suggests the purpose is to preclude “subsidy” to carriers with “artificially” low rates, but does not define what it means by “artificial” or address the issue that while local rates provide calling within a local area there are order of magnitude differences in calling scope between urban and rural local service areas. Comparing rates between a carrier’s local service area with a calling scope of 1000 other subscribers with the rates of a carrier with a calling scope of 1,000,000 is not an apples to apples comparison. For RICA member rural CLECs, benchmarks raise the additional issue of how to compare ILEC and CLEC rates when ILECs are required to collect a Subscriber Line Charge, but CLECs are not. RICA and others

³⁴ *Id.*, p. 3.

have raised this issue in the context of the computation of interstate revenue for USF contribution purposes.³⁵

- Total Company Earnings review

The proposal to base support on total company earnings raises significant questions of jurisdiction and authority. Consistent with the requirements of Section 254(k), the existing parts 32, 36 and 64 rules are designed to prevent cross-subsidy, including ensuring that supported services “bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.”³⁶ Since broadband must be designated a supported service if it is to receive universal service support, the existing statute-based requirements appear to properly address the only lawful question: whether carriers are earning excessive returns on regulated or supported services.

In addition to these legal issues, the practical questions raised by this aspect of the *Further Inquiry* are far beyond any undertaking that could be completed in the short term. Rate of Return prescription, for example, as described above, involves risk determinations for carriers with different mixes of unregulated/unsupported services. These mixes vary over a broad range, as do debt costs and debt/equity ratios. The proposal to require submission of dividends or patronage refunds paid is irrelevant to earnings. Distributions of dividends or patronage refunds occur only after a return or margin has been booked. The act of issuing a dividend or patronage refund does not change or alter whether the universal service provider has or has not recovered its lawful expenses including a reasonable return on investment.

F. Highest Cost Areas

³⁵ Petition of RICA Members for Declaratory Ruling Regarding Imputation of Interstate Revenue, WC Doc. No. 06-122, Apr 26, 2011. Comments Requested, Public Notice DA 11-851, May 9, 2011.

³⁶ 47 U.S.C. 254(k)

The ABC Plan proposes to refuse the provision of support to serve those rural consumers residing in the highest cost-to-serve rural areas. The ABC Plan fails to articulate any possible legal basis for the Commission to ignore the explicit mandate of the Act by providing support to an ETC that does not offer the supported services “throughout the service area for which designation is received--.” Resale of satellite services would not meet the requirement unless the definition of broadband supported services is “dummied down” to meet the limited capabilities of satellites. Such a definition would not, however, be consistent with the principle of Section 254(b)(3) that consumers in rural areas should have access to services that are reasonably comparable to services available in urban areas. Satellite service is generally a significant improvement for consumers that have had only dial-up, but it is hardly comparable to the services offered by fixed providers in urban areas.

H. Implementing Reform within a Defined Budget

RICA has previously explained that the entire exercise of setting the “budget” for broadband support based upon the revenues that can be obtained from the declining voice grade system is irrational. Assuming the goal is ubiquitous broadband access, the only rational approach is for the Commission to examine the revenues that could be obtained from a contribution system targeted towards broadband access providers.³⁷ Many parties made similar arguments, yet the ABC Plan and the Further Notice give no indication that this elementary point has registered.³⁸ Instead, they proceed as if the funds available to support broadband are limited to the size of the current fund because any further increase in contribution obligation on voice

³⁷ RICA Comments, April 18, 2011, p. 7-8.

³⁸ See, Reply Comments of Montana Public Service Commission, May 23, 2011, p.4: (“In addition, the MPSC finds it incomprehensible that the FCC can propose future funding levels for the CAF without examining and proposing reforms for the contributions to the CAF. The MPSC urges the FCC not to predetermine the size of the CAF without first looking at contribution reform to broaden the base of contributors.”)

grade users would be intolerable. The latter is probably true, but irrelevant to the issue of what an acceptable contribution level would be for broadband users.

In a recent *ex parte* Google, et al. make a similar point:

Logically, USF reform must consider comprehensively both distribution of broadband connectivity support and the contributions required to meet those subsidy obligations..... For USF restructuring to make sense, the FCC should update the contribution mechanism to create a sustainable, equitable, and forward-looking structure to fund broadband connectivity support. ... the Commission must address and include contribution reform when it creates one or more broadband funds.³⁹

The Commission's refusal to simultaneously consider contribution and distribution for broadband in combination renders the whole exercise inconsistent with the text and the purpose of Sections 214 and 254. That inconsistency is exacerbated in the context of the irrational proposals to substantially reduce support for small entities that do provide broadband while increasing support for large entities that have consistently failed to invest in rural areas.

I. Interim Reforms for Price Cap Carriers

Windstream, Frontier and Century-Link propose that the Commission immediately begin to compute the support for Price Cap companies based on wire center rather than study area average costs, but cap the amount of such support. This proposal addresses in principle a piece of the problem with the current system that results in no support for high cost areas in average cost study areas. However, if the total funds available do not increase, the only result apparently would be to redistribute funds from carriers with high study area average costs to those with high wire center costs. RICA has no objection to such reshuffling, *provided*, that at the same time the Commission eliminate the identical support rule and allow rural CLECs to qualify for support based upon a cost study conforming to rural ILEC requirements.

³⁹ Letter to Chairman Genachowski and Commissioners Copps, McDowell and Clyburn, signed with corporate logos of Ad Hoc Telecommunications Users Committee, Google, Inc., Skype Communications S.A.R.L., Sprint Nextel Corporation, and Vonage Holdings Corp., WC Doc 10-90, August 18, 2011.

II. Intercarrier Compensation

RICA's position on intercarrier compensation reform is a matter of record, and comprises two basic principles. First, the utilization of facilities to originate or terminate traffic requires that the owner of the facilities be compensated. Second, this compensation, together with appropriate support mechanisms, should be sufficient to ensure that the resulting rates assessed to rural end-users are comparable to the rates for urban end-users. The first principle is derived from basic property law, while the second principle is mandated by Section 254(b)(3) of the Act.

In the context of the *Further Inquiry*, RICA's primary concern is that the reform of existing mechanisms be consistent with law and policy, and be fairly applied. Rural CLECs have justifiably relied on the existing CLEC access rules for the recovery of a percentage of the costs of deploying facilities and offering services in higher-cost rural areas. Accordingly, any recovery mechanism adopted as a replacement for access revenues must also be available to rural CLECs.

More than ten years ago, the Commission established a "bright line" for determining whether CLEC access charges would meet the statutory test of just and reasonable rates. In its 2001 order,⁴⁰ the Commission established a presumptively reasonable benchmark CLEC access charge at the rate being charged by the competing ILEC, but established a specific exception for CLECs operating in rural areas.⁴¹ Noting that "CLECs often are more likely to deploy in rural areas the new facilities capable of supporting advanced calling features and advanced telecommunications services,"⁴² and specifically recognizing that rural CLECs experience "much

⁴⁰ *CLEC Access Charge Order*

⁴¹ *See generally, id.* at 9949-9956.

⁴² *Id.* at 9950 (footnote omitted).

higher costs, particularly loop costs, when serving a rural area with a diffuse customer base,”⁴³ the Commission substituted the higher NECA access charge rate as the benchmark for qualifying rural CLECs. In doing so, the Commission rejected the suggestion that the rural exemption constituted an implicit subsidy of rural CLEC operations in allowing the rural CLEC to charge more for access to its end-user than the non-rural ILEC previously serving that end-user. Rather, it held that the interexchange carrier was merely deprived of the implicit subsidy it had received for access to certain rural customers that arose by virtue of the requirement that non-rural ILECs must average access rates throughout state-wide study areas.⁴⁴

RICA reiterates the detail of the *CLEC Access Charge Order* here to emphasize that the facts that supported that decision have not changed, nor have these facts even been met with a serious challenge. These facts are highly relevant to the current decision-making process: the cost of service in rural areas is higher than in urban areas for rural rate-of-return ILECs and rural CLECs alike. Irrespective of the cost recovery mechanism adopted by the Commission, these costs will remain, and the resulting differential between rural/urban costs will remain. The reasons for the adoption of the rural exemption for CLECs remain valid and compelling, and, accordingly, serve as justification for the extension to RICA members and other rural CLECs of any newly-adopted support or revenue replacement mechanism for rural ILECs to ensure that rates for urban and rural end-users remain comparable.

A. Federal-State Roles

As an initial matter, RICA notes that the Commission’s discussion of the proposed federal-state frameworks for reform appears to ignore the existence of rural CLECs. In the

⁴³ *Id.*

⁴⁴ *Id.* at 9951.

context of the Commission’s proposed glide path approach to reducing all interstate access rate elements,⁴⁵ RICA submits that rural CLECs should participate in rate restructuring in the same manner as rural ILECs. Because of the similarity in characteristics between rural ILECs and rural CLECs, and consistent with the underlying rationale of the *CLEC Access Charge Order*, the public interest requires the recognition of those similarities through the extension of programs adopted for rural ILECs to RICA members and other rural CLECs.

RICA is on record in this and predecessor proceedings as advocating a cooperative federal-state approach to access charge reform.⁴⁶ While fundamental reform in intercarrier compensation, including reduction of access charges, is necessary, RICA has cautioned against precipitous actions that are contrary to the Act, including preemption of state regulation of intrastate services. For statutory and purely pragmatic purposes, state regulatory authorities remain uniquely positioned to consider purely local issues.

B. Scope of Reform

The ABC Plan’s proposal to focus on substantial reductions to terminating rate elements only is apparently driven by the attempt to *sub silentio* preempt state regulation of intrastate access by shoehorning interexchange access into the reciprocal compensation provision of Section 251(b). As has been explained many times in these proceedings, if Congress had meant to include access in under Section 251(b)(5) it would have written it differently. The intra-interstate access rate disparity is both an originating and terminating issue that should be dealt

⁴⁵ *Further Inquiry* at 13.

⁴⁶ *See, e.g.*, Comments of the Rural Independent Competitive Alliance (“RICA”) filed herein on April 18, 2011; Comments of RICA, WC Docket No. 05-337 et al., (filed Nov. 26, 2008) (“RICA 2008 Comments”).

with in straightforward manner. To the extent that the application of reforms to rural ILECs will be mirrored for rural CLECs, RICA members will also be disadvantaged.

C. Recovery Mechanism

RICA's principles of reasonable cost recovery and parity of urban/rural rates should govern the selection of recovery mechanisms. This is applicable to rural ILECs and CLECs alike, despite the fact that the *Further Inquiry* apparently did not contemplate the application of reform to these carriers. Because rural CLECs will be materially affected by intercarrier compensation reform, their situation and status warrants consideration.

Accordingly, CLEC participation in recovery mechanisms should be non-discriminatory, and fully comparable to the participation afforded rural ILECs. The Commission should embrace this maxim fully and, in so doing, correct a long-standing injustice resulting from the MAG Order's disparate treatment of ILECs and CLECs by refusing to allow CLEC participation in the recovery of eliminated carrier common line charges through a new support component (ICLS) afforded to rural rate-of-return ILECs.⁴⁷ As RICA has demonstrated, rural CLECs have comparable operational and capital cost characteristics to rural ILECs and, accordingly, should operate under comparable cost recovery rules. Substantial improvements in service and access to advanced communications capabilities would not be available to rural subscribers in many cases in the absence of the investment by rural CLECs. That investment, in turn, requires an opportunity to achieve a revenue stream comparable to that of a rural ILEC.

D. Impact on Customers

⁴⁷ *Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Order, 16 FCC Rcd 19613 (2001).

The direct beneficiaries of intercarrier compensation reform, the large interexchange carriers, will, under the ABC Plan, control any pass-through to their subscribers. Incumbent carriers, on the other hand, may be under pressure to pass along price increases to customers (or, as the ABC Plan puts it, incumbent carriers “are permitted” to increase consumer subscriber line charges (“SLC”)). In targeted, highly-competitive markets, it is possible that consumers may see a net decrease in service prices. In other markets, the subscriber may, if fortunate, simply be taking money out of one pocket and putting it into another. The impact on consumer groups ultimately will depend upon their relative consumption of wireline local and long distance services – and, to the extent that bundled local and long distance services are provided, the marketing skills of the bundler. To maintain competitive neutrality, however, the Commission must treat similarly-situated carriers comparably, avoiding unfair or uneven pressures on price increases by ensuring that rural CLECs have access to cost recovery mechanisms.

E. VoIP ICC

Interconnected VoIP traffic should not be treated differently from any other access traffic that utilizes the facilities of a carrier for the termination of a call. The ABC Plan does not go far enough in proposing a “new rule;” existing rules should apply in a technology-neutral manner. As RICA has noted, today’s exemption from access charges was adopted more than 20 years ago to encourage the growth of an infant data processing industry.⁴⁸ Clearly, such deference is no longer warranted. In the interests of promoting fully fair and competitive reform, VoIP should be subject to the reforms adopted in this proceeding.

⁴⁸ RICA 2008 Comments at p. 11 (footnote omitted).

III CONCLUSION

Although critical of many aspects of the ABC Plan, and in disagreement with a few portions of the State Members proposal, RICA has emphasized from the beginning that it supports reform of both the Universal Service Fund and Intercarrier Compensation rules. RICA strongly supports the goal of ubiquitous broadband deployment as its members have seen first hand the benefits to consumers of broadband access in rural areas served by rural CLECs and rural ILECs. RICA also supports ubiquitous deployment of mobile services. The essence of RICA's quarrels with the ABC Plan, and the NPRM before it, are that they fail to understand that those goals are most likely to be achieved by empowering the small, locally owned and controlled carriers that have demonstrated both the ability and intent to serve their rural neighbors.

It has been well recognized for several years that the country suffers from a digital rural/urban divide. It has also been acknowledged, although more quietly, that this divide exists to a much greater degree in the service areas of the price-cap ILECs. The later phenomena is a result of multiple factors including incentive (price cap) regulation that rewards non-investment in rural areas where profit ratios are lower and the natural tendency of large companies to focus on their larger concentrations of residents and their enterprise customers. From the perspective of RICA member rural CLECs, it is also a plain result of the Commission's identical support rule and the MAG access charge decision that severely limited their ability to expand competitive services into the price cap company areas. Now, the ABC Plan follows the Commission's National Broadband Plan and its two NPRMs in proposing to eliminate all USF for rural CLECs and reduce their interstate and intrastate access charges to a level below the cost of billing them.

\The Commission's and the ABC Plan's approach suffer from the fundamental fallacies of assuming that provision of more USF to large companies will incent them to serve rural areas despite their failures to do so since the late 19th Century. The complementary assumption must be either that despite substantial reductions in revenues, rural CLECs will be able to continue providing their high level of broadband service or that the newly incented price cap carriers will be able to successfully replace the level of service provided by rural CLECs.

A better alternative is to permit the idea that rural CLECs can function on access at the levels proposed and without USF support and allow rural CLECs to qualify for USF under the same rules as rural ILECs, including any USF replacement of access revenue.

Respectfully submitted

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